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Supreme Court of the United States

OCTOBER TERM, 1963

No. 532

GENE O'NEAL AND JOHNNIE JAMES YOUNG,
PETITIONERS,

versus

THE UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The R. L. Bryan Company, Legal Printers, Columbia, S. C.

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The petitioners pray that a Writ of Certiorari issue to review the decision and judgment of the United States Court of Appeals for the Fourth Circuit, dated and entered in this case on September 10th, 1963.

The opinion of the District Court (App. Page 11) is not reported.

The opinion of the Court of Appeals (App. Page 27) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on September 10th, 1963 (App. Page 27). The jurisdiction of this Court is invoked under the provisions of 28 U. S. C., Section 1254.

QUESTIONS PRESENTED

1. Whether the forceful nighttime entry into a wash house, a part of a dwelling, to arrest a person reasonably believed within, upon probable cause that he has committed a felony, under circumstances where no reason appears why an arrest warrant could not have been sought, is consistent with the Fourth Amendment?

2. Whether a federal officer may without warrant and without consent physically entrench himself into a man's home, and secretly observe or listen, and relate at the man's subsequent criminal trial what was seen or heard?

STATEMENT

Robert R. Briggs is an investigator for the Alcohol and Tobacco Tax Division of the Treasury Department of the United States. On the evening of June 10th, 1960 at sundown, Agent Briggs and two other agents of the government went to the area surrounding the home of the petitioner, Gene O'Neal, near the City of Darlington, South Carolina. They secreted themselves, according to Mr. Briggs' testimony, at a point in some woods approximately five to seven yards back of a wash house, which was located about ten yards from the house of the petitioner, Gene O'Neal (the actual distance of the wash house is somewhat in dispute). In the wash house, there is plumbing, washing machines, old furniture, etc.; the building was used by petitioner's wife as a laundry room and as an annex of her home. Briggs testified that they could see lights shining through small cracks in the barn and occasionally could

hear slight sounds and movements, and could detect the odor of non-tax paid whiskey coming from the barn (throughout his testimony, Briggs referred to this building as a barn). From the point at which the officers were secreting themselves, they saw some people, one of whom was later identified as the petitioner, Young, remove several cardboard boxes from an automobile and place them near the back steps of the home of O'Neal. At about twelve o'clock the government agents stealthily approached the wash house; listened to a conversation at the door (which was later used against the petitioners); opened the door and there inside of the building arrested the petitioners. They had neither a search warrant nor an arrest warrant at the time. In the wash house or barn, there was located a quantity of non-tax paid alcohol. The alcohol together with the petitioner's automobile and all jars were confiscated by the government agents.

Petitioners made timely motions to suppress at the trial the evidence acquired by the government agents on the grounds that their conduct constituted an unreasonable search and seizure against which the petitioners are protected by the Fourth Amendment to the Constitution of the United States. This motion was overruled by Judge Wyche at the hearing thereof on the 5th day of December, 1962.

The Petitioners waived a jury and were tried on the 10th day of December, 1962, before the Honorable C. C. Wyche, Presiding Judge of the United States District Court for the Eastern District of South Carolina, Florence Division.

At the trial, counsel for the petitioners objected to the testimony offered by Briggs on the grounds that his testimony resulted from an unreasonable search and seizure, which is prohibited by the Fourth Amendment to the United States Constitution. By agreement of counsel, petitioners'

objection applied to all the testimony of Briggs. Petitioners' objection was overruled by the trial judge and at the conclusion of the testimony of Briggs no further evidence was offered by either the government or the petitioners. The petitioners were found guilty by the trial judge and sentenced.

From the trial judge's refusal to suppress the testimony and from his overruling of the objection of petitioners to the testimony offered by the government at the trial, the resulting conviction and sentencing of the petitioners, the petitioners appealed to the United States Court of Appeals for the Fourth Circuit, which Court affirmed the rulings of the District Court by opinion dated and filed September 10th, 1963. The reason stated for affirmance by the Court of Appeals was that the search was valid because a crime was being committed in the presence of the officers and the search was incidental to a valid arrest.

REASONS FOR GRANTING THE WRIT

I. The Supreme Court has stated that the facts under consideration here constitute a grave constitutional question.

In the case of *Jones v. United States*, 78 S. Ct. 1253, 357 U. S. 493, 2 L. Ed. (2d) 1514, the Court had this to say in paragraph six of the opinion: "These contentions, if open to the Government here, would confront us with a grave constitutional question, namely, whether the forceful nighttime entry into a dwelling to arrest a person reasonably believed within, upon probable cause that he had committed a felony, under circumstances where no reason appears why an arrest warrant could not have been sought, is consistent with the Fourth Amendment".

The facts in this case squarely fit the above question. The federal agents had no warrant of any kind; it was after

midnight when they were arrested. Although the testimony is somewhat confused as to whether petitioners opened the door of the wash house or whether the government agents did, there can be no question but what the government agents at the time were trespassers and their entry into the wash house amounted to force or force by stealth.

The house had been under surveillance by a number of federal agents from sundown (approximately 6:45 P. M. at this time of the year) until after midnight when the arrests were made. Certainly they could have obtained a search warrant or an arrest warrant during this period. No reason appears why an arrest warrant or a search warrant could not have been sought or obtained.

The Supreme Court has distinctly held that this is a grave question. It has not been decided by the Supreme Court and counsel for petititoners submit that it should be.

II. The decision of the Court below is in direct conflict with applicable decisions of this Court and other Courts of appeal.

The federal officers testified at petitioners' trial that they secreted themselves in woods directly behind petitioner's wash house. There is no testimony in the record as to whether these woods were on the lot on which petitioner's house and wash house were located. However, Agent Briggs testified as follows: "And at this time Mr. Ledford and I went into the yard from the woods, the woods being off the curtilage. We went to the door of the barn and stood there for several moments, during which time I heard voices inside commenting on the number of cases they had".

In the case of *Silverman v. United States*, 365 U. S. 505, 5 L. Ed. (2d) 734, 81 S. Ct. 679, the Court at page 739 of 5 L. Ed. (2d) said: "This Court has never held that a federal officer may without warrant and without consent

physically entrench into a man's office or home, there secretly observe or listen, and relate at the man's subsequent criminal trial what was seen or heard".

The above quotation of the Supreme Court is unquestionably the law of the land. Although the federal agents were not actually in petitioner's house they at that time had secreted themselves at midnight just outside of his door and there secretly listened and related at petitioners' subsequent trial what they heard.

The Court of Appeals (Page 27 of Appendix) said that the agents paused at the door and heard the petitioners discussing the number of cases they had. Petitioners point out that Agent Briggs testified that they went to the door of the barn and stood there for several moments during which time they heard the voices inside (Page 28 of Appendix).

The Court of Appeals held (Page 29 of Appendix) "In the absence of any testimony whatever that the woodlands were owned by O'Neal, there is no basis for a finding that the agents committed even a technical trespass as they observed the defendants' activities from their concealed position in the woodlands". Petitioners point out that Agent Briggs testified (Page 17 of Appendix) "This particular patch of woods comes right up to the back of the barn at approximately—well, just a short distance behind the barn, 15 or 20 feet, and the barn is about 40 steps from the house, the back of the house". Agent Briggs later testified (Page 19 of Appendix) "and I went into the yard from the woods, the woods being off the curtilage".

It would seem to counsel for petitioners that in the absence of testimony that Agent Briggs knew the size of petitioner's lot or had seen a plat or public records pertaining thereto that the Federal Courts of this Nation would

not assume that woods right up to the back of his wash house were not within the curtilage of petitioner's home.

As a matter of fact, this assumption is in direct conflict with rulings from other Circuits of the Federal Judiciary Court of Appeals System. See the following cases: *Walker v. United States*, 225 Federal (2d) 447 (the Court's attention is particularly drawn to this case), *Morrison v. United States*, 262 Federal (2d) 449, 104 U. S. Appeal 352; *Care v. United States*, 231 Federal (2d) 22, and *District of Columbia v. Little*, 178 Federal (2d) 13, 85 U. S. Appeal D. C. 242.

The District Court below did not rule on this particular point and there was no finding of fact about it.

In view of the clear-cut rule of law stated in the *Silverman case*, petitioners' counsel feel that there is a clear-cut conflict between the decisions of the Court below and the *Silverman case* and the Court should intervene in order to bring about uniformity in the administration of Federal Courts and in the interest of justice.

CONCLUSION

For the foregoing reasons this petition for Writ of Certiorari should be granted.

Respectfully submitted,

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